NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. **KENNETH SOUTHWELL**, Defendant - Appellant.	No. 04-30521 D.C. No. CR-03-00191-FV **MEMORANDUM** *

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, Chief Judge, Presiding

Argued and Submitted September 14, 2005
Seattle, Washington

Before: **ALARCÓN**, **KOZINSKI** and **KLEINFELD**, Circuit Judges.

1. The district court did not abuse its discretion in admitting evidence that Southwell started five previous house fires. Although character evidence is generally inadmissible to prove actions in conformity therewith, Fed. R. Evid. 404(a), evidence of other crimes may be admitted to prove motive, Fed. R. Evid.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

404(b). "Evidence of other crimes or acts is admissible under Rule 404(b), except where it tends to prove only criminal disposition." United States v. Ayers, 924 F.2d 1468, 1473 (9th Cir. 1991) (quoting United States v. Sangrey, 586 F.2d 1312, 1314 (9th Cir. 1978) (quoting United States v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977) (per curiam))) (internal quotation marks omitted). Evidence of prior crimes may be admitted if

> (1) sufficient evidence . . . exist[s] for the jury to find that the defendant committed the other acts; (2) the other acts [are] introduced to prove a material issue in the case; (3) the other acts [are not] too remote in time; and (4) if admitted to prove intent, the other acts [are] similar to the offense charged.

Id.

Here, the jury was presented with sufficient evidence from which it could reasonably infer that defendant had set the five previous house fires. Each fire was set at the same vacant house where defendant had lived with his ex-wife, who divorced him to remarry an employee of the Heart Seed Company—the company whose building the defendant was accused of burning down. In addition, defendant was spotted at the scene of the most recent house fire shortly after it was set and had no convincing explanation for why he was there. Because evidence of the five previous house fires was introduced to prove motive, each occurred within only six weeks of the fire at the Heart Seed Company and each was similar to the

offense charged, the district court did not abuse its discretion in admitting evidence of these prior acts under Rule 404(b).

2. Because the district court admitted evidence of the prior house fires shortly after defense counsel argued that such evidence was unfairly prejudicial, we conclude that the district court properly considered Fed. R. Evid. 403's requirements and did not abuse its discretion in admitting such evidence. See United States v. Jackson, 84 F.3d 1154, 1159 (9th Cir. 1996).

3. "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " Oregon v. Mathiason, 429 U.S. 492, 495 (1977). An individual is in custody if the police put him in a situation from which a reasonable person would believe he is not free to leave. See United States v. Hayden, 260 F.3d 1062, 1066 (9th Cir. 2001). Here, Southwell voluntarily spoke with the agents and was never told that he was not permitted to leave. Because Southwell was not in custody at the time he confessed, no Miranda warning was required and his confession was admissible.

4. A corpus delicti motion is not a suppression tool; it is a theory supporting a judgment of acquittal. The amount of evidence that must corroborate a

confession is very low. First, the government "must introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred." United States v. Corona-Garcia, 210 F.3d 973, 978 (9th Cir. 2000) (quoting United States v. Lopez-Alvarez, 970 F.2d 583, 592 (9th Cir. 1992)). Second, the government "must introduce independent evidence tending to establish the trustworthiness of the admissions." Id. (quoting Lopez-Alvarez, 970 F.2d at 592).

Agent Hart's testimony that the fire was set by a human hand, together with the discovery of the charcoal lighter fluid at the location specified by defendant, corroborated his confession. The district court therefore did not err in permitting the prosecution to discuss the confession during its opening argument, nor in denying Southwell's corpus delicti motion, since the confession was sufficiently corroborated.

5. Because the defendant proposed Jury Instruction No. 9—the very instruction he now challenges—we review for plain error. See United States v. Burt, 143 F.3d 1215, 1217 (9th Cir. 1998). As the instruction accurately described the burden of proof with respect to the insanity defense, see 18 U.S.C. § 17(b); United States v. Keen, 96 F.3d 425, 431 n.7 (9th Cir. 1996), there was no error, much less plain error.

AFFIRMED on the issues discussed in this memorandum disposition.[1]

[1] We reverse and remand on other issues in this case, which are discussed in a separate opinion filed concurrently with this memorandum disposition.